(4)

No. 06-53

Supreme Court, U.S.
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# In The
# Supreme Court of the United States

MR. JEFFREY F. JONES,

*Petitioner*,

v.

THE HONORABLE JANET R. BURNSIDE, JUDGE,

*and*

THE HONORABLE THOMAS J. MOYER, CHIEF JUSTICE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio**

## PETITION FOR REHEARING

RICHARD G. JOHNSON
*Counsel of Record*
RICHARD G. JOHNSON CO., L.P.A.
220 Crittenden Court Building
955 West St. Clair Avenue
Cleveland, Ohio 44113-1210
216/696-1000

*Attorney for the Petitioner*

[dated: 10/12/06]

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## PETITION FOR REHEARING

The Petitioner, Mr. Jeffrey F. Jones, respectfully moves this Supreme Court of the United States for an order (1) vacating its denial of his Petition for a Writ of Certiorari, heard in Conference on September 25, 2006 and entered on October 2, 2006, and (2) granting his Petition.[1]

As grounds for this Motion, which are "limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented," U.S. SUP. CT. R. 44.2, the Petitioner states the following:

On the front page of the Sunday, October 1st, New York Times, it was reported, in part, as follows:

> Thirty-nine states elect judges, and 30 states are holding elections for seats on their highest

[1] In his Petition for a Writ of Certiorari, the Petitioner respectfully prayed for this Court to grant a writ of certiorari to review the Ohio Supreme Court's refusal to disqualify the Trial Court from presiding over his underlying and pending legal malpractice case against the Defendants. Petition for a Writ of Certiorari, at 1, 30. The Petition was filed July 10, 2006, it was received by the Clerk of this Court on July 12th, and it was docketed on July 13th. The Petition was served on the Respondents and Underlying Defendants by Federal Express, and it was delivered to all of them on July 11th. The Petitioner notified the Respondents and Underlying Defendants of the docketing of the same, on the forms provided by the Clerk's office, by United States First-Class Mail on July 17th (the same day he received the same from the Clerk's office). On July 24th, the Petitioner filed a Supplemental Brief in regards to why the Petition is not moot. On August 14th, the Chief Justice of the Ohio Supreme Court filed his Waiver of his Right to Respond to the Petition. On September 19th, the Petitioner filed a Second Supplemental Brief. To date, the Trial Court has made no filing herein.

courts this year. Spending in these races is skyrocketing, with some judges raising $2 million or more for a single campaign. As the amounts rise, questions about whether money is polluting the independence of the judiciary are being fiercely debated across the nation. And nowhere is the battle for judicial seats more ferocious than in Ohio.

An examination of the Ohio Supreme Court by The New York Times found that its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time. Justice O'Donnell voted for his contributors 91 percent of the time, the highest rate of any justice on the court.

In the 12 years that were studied, the justices almost never disqualified themselves from hearing their contributors' cases. In the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times.

Even sitting justices have started to question the current system. "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race," said Justice Paul E. Pfeifer, a Republican member of the Ohio Supreme Court. "Everyone interested in contributing has very specific interests."

"They mean to be buying a vote," Justice Pfeifer added. "Whether they succeed or not, it's hard to say."

Three recent cases, two in Illinois and one in West Virginia, have put the complaints in sharp focus. Elected justices there recently refused to

> disqualify themselves from hearing suits in which tens or hundreds of millions of dollars were at stake. The defendants were insurance, tobacco and coal companies whose supporters had spent millions of dollars to help elect the justices.
>
> After a series of big-money judicial contests around the nation, the balance of power in several state high courts has tipped in recent years in favor of corporations and insurance companies.
>
> In the 2002 Ohio judicial election, for example, two candidates won seats that year on the seven-member court after each raised more money than one of the candidates for governor that year.

Adam Liptak & Janet Roberts, *Tilting the Scales? The Ohio Experience: Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A-1;[2] *see also* Adam Liptak, *Case Studies: West Virginia and Illinois*, N.Y. TIMES, Oct. 1, 2006, at A-21 (discussing examples from those states);[3] *see generally*, Opinion, *Judicial Politics Run*

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[2] Article available at http://select.nytimes.com/search/restricted/article?res=F50C16F93C540C728CDDA90994DE404482.

The photographs and graph from the article are not available online. Searching the New York Times database will allow one to pull up a table of the justices' rulings on their contributors' cases, where one can click on any individual justice and see a listing of those cases, contributors, and amounts, but there is no observable web address for this link. Ditto for a video presentation by the lead author.

[3] Article available at http://select.nytimes.com/search/restricted/article?res=F10A16F93C540C728CDDA90994DE404482.

In the case of *Avery v. State Farm Mutual Automobile Insurance Co., cert. denied*, 126 S. Ct. 1470 (2006), which was one of the Illinois

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*Amok*, N.Y. TIMES, Sept. 19, 2006, at A-24 (arguing that high spending and special interest involvement in judicial campaigns undermine public respect and confidence in the judiciary).[4]

The Ohio State Bar Association responded to this article by saying that the "Association would like to see consideration of stronger recusal and/or disqualification provisions that would be triggered when campaign contributions reach certain levels, subject to waiver by mutual consent of the parties." Press Release, Oh. St. B. Ass'n, Oct. 5, 2006 (statement of President John S. Stith).[5]

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cases, this Court denied certiorari on March 6, 2006. There are many reasons why this Court may have chosen to decline *Avery*: (1) There was no disqualification motion made in *Avery*, there was only a conditional recusal motion made, and the rehearing thereof was held to be moot (in this Case, both motions were made directly); (2) There was no evidence in *Avery* that the party, itself, had made the contributions, only that its agents and employees had made the contribution (in this Case, it is uncontested that the opposing party made the contributions); (3) *Avery* was a very complicated case, where the allegation was that the state supreme court justice at issue was decisive on only part of the underlying opinion (in this Case, there has not yet been a final outcome, and this Court could focus squarely on the ethical issues); and (4) *Avery* did not argue ABA Mode Code of Judicial Conduct Canon 3(E)(1)(e) or explain the ABA's position on this topic (obviously, that is squarely at issue in this Case). Apart from the huge amount of money involved in *Avery*, it was not a good test case for creating a recusal/disqualification standard based upon campaign contributions, for the above-stated reasons and many more, including the fact that the petitioner did not argue that case from a judicial ethics perspective, and he did not cite to the voluminous judicial ethics secondary authority, the ABA's position under its current MCJC, or the ABA's forthcoming revision thereof.

[4] Opinion available at http://select.nytimes.com/search/restricted/article?res=F60616FB3B550C7A8DDDA00894DE404482.

[5] Press Release available at www.ohiobar.org/pubs/insideosba/?articleid=876.

In declining to grant certiorari in this Case, this Court has ignored the fundamental due process deprivations being experienced in Ohio and nationally in favor of leaving the political question of how judges should be chosen to the states to deal with – even though these are separate issues. This makes no sense, because this Court has repeatedly held that "due process requires a 'neutral and detached judge in the first instance. . . .'" *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972)); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (discussing requirement of neutrality). As demonstrated by the New York Times, clearly this due process requirement is not being met in Ohio and elsewhere. This Court does not have to answer the political question in order to protect litigants' due process rights via a recusal/disqualification standard related to campaign contributions.

From a macro level, this Court could well leave it to the citizens of Ohio and the other states to clean up this mess, but from the micro level, hundreds, thousands, or millions, of litigants in Ohio and elsewhere have been, are being, or will be, subjected to judges biased and prejudiced against them due to campaign contributions, which amounts to an incalculable denial of due process across the board. *See* Petitioner's Supplemental Brief, at 8-10 (discussing why this Case is clearly capable of repetition, yet otherwise evading review, if this Case were otherwise deemed moot); Petitioner's Second Supplemental Brief, at 5-7 & n.13 (discussing why the incumbent chief justices have no incentive to adopt reform); *see also* Amanda Bronstad, *Cash Is Flowing in Judicial Elections*, NAT'L L.J., Oct. 9, 2006 (discussing the effect of this Court's

*White* decision on increasing money in judicial elections);[6] Kimberly A. Strassel, *Corporate America Takes on Spitzerism*, WALL ST. J., Sept. 25, 2006, at A-14 (discussing the National Association of Manufacturers' American Justice Partnership, which is designed to coordinate the campaign funding and strategy of pro-business state supreme court candidates).

Ignoring litigants' due process rights, while turning a blind eye to the erosion of judicial independence caused by the lack of a recusal/disqualification standard related to campaign contributions, is inconsistent with this Court's past and current statements regarding threats to judicial independence. *See* Petitioner's Petition for a Writ of Certiorari, at 20-26; Supplemental Brief, at 8-10; Second Supplemental Brief, *passim*; *see also* Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A-18 (discussing same); *see generally* Tony Mauro, *Roberts Makes Strong Plea for Judicial Independence: Chief Justice and Attorney General, as well as Justice Breyer, Sound a Clarion Call for Judicial Independence*, LEG. TIMES, Oct. 20, 2006 (reporting on the *Fair and Independent Courts: Conference on the State of the Judiciary*, Sept. 28-29, 2006, held at Georgetown Law Center, Washington, D.C.);[7] Michael Scholl, *Alito Says Level of Attacks on Judges Hits Historic High*, N.Y. L.J.,

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[6] Article available at www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1160125529678.

[7] Article available at www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1159693520619; conference materials are available at www.law.georgetown.edu/judiciary.

Oct. 2, 2006 (reporting on speech where Justice Alito "stress[ed] the importance of judicial independence").[8]

## CONCLUSION

In conclusion, and for the foregoing reasons, as well as those contained in the Petition for a Writ of Certiorari and Supplemental Briefs, the Petitioner prays that this Supreme Court of the United States grant rehearing of the order of denial, vacate that order, and grant the Petition and review the judgment and opinion below.

Respectfully submitted,

RICHARD G. JOHNSON
*Counsel of Record*
RICHARD G. JOHNSON CO., L.P.A.
220 Crittenden Court Building
955 West St. Clair Avenue
Cleveland, Ohio 44113-1210
216/696-1000

*Attorney for the Petitioner*

[dated: 10/12/06]

[8] Article available at www.law.com/jsp/nylj/PubArticleNY.jsp?id=1159520730064.

## CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in U.S. Supreme Court Rule 44.2.

Respectfully submitted,

RICHARD G. JOHNSON
*Counsel of Record*
RICHARD G. JOHNSON CO., L.P.A.
220 Crittenden Court Building
955 West St. Clair Avenue
Cleveland, Ohio 44113-1210
216/696-1000

*Attorney for the Petitioner*

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